BANFOONG SYDNEY (JM) SDN. BHD.

v.

MIFC CREDIT & LEASING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-23-2420-1988]
17 MARCH 1989

COMPANY LAW: *Winding-up - Indebtedness - Disputed debt - Judgment in default of appearance - Set aside - Dismissed - To restrain legal proceeding to wind up company - No locus standi - Abuse of the process of the Court.*

CIVIL PROCEDURE: *Judgment in default of appearance - Regular judgment - Obtained by fraud or collusion.*

The plaintiff is a company incorporated in Malaysia having its registered office at No. 110A, Jalan Jejarak, Taman Maluri, Kuala Lumpur. The defendant is also a company incorporated in Malaysia and having its registered office at No. 1A, Jalan Jejaka 2, Taman Maluri, Kuala Lumpur.

The managing director of the plaintiff company averred that the receivers of the defendant company, through their solicitors, served a notice pursuant to s. 218 of the Companies Act 1965 demanding the plaintiff to pay a sum of RM344,510.42, and notifying them that the failure to pay within twenty one days from the date of the notice will result in a winding-up proceeding.

A judgment in default of appearance was obtained by the defendant against the plaintiff. The plaintiff applied to set aside the judgment in default and to stay all execution proceedings but the application to set aside the judgment in default was dismissed. The plaintiff then applied for the matters to be adjourned to open Court for further argument but until today no date had been fixed for the hearing.

This is an application by the plaintiff for an order of the Court to restrain the defendant from instituting any legal proceedings to wind-up the company. According to the plaintiff, the winding-up proceedings instituted by the defendant was based on a disputed debt and was therefore an abuse of the process of the Court.

The plaintiff also averred that, in an application to set aside a winding-up petition, where there is no judgment debt the question for the Court to consider is whether the petitioner is a creditor and the respondent is a debtor. If the debt claimed by the petitioner is disputed by the respondent then the petitioner is not a creditor as envisaged in s. 217 of the Companies Act. The petitioner is therefore not entitled to file a winding-up petition as he has no *locus standi* and the petition is an abuse of the process of the Court and should be struck off.

Held:

[1] The judgment in default of appearance is a regular judgment. There is therefore a judgment debt and the defendant is a creditor as envisaged in s. 217 of the Companies Act. The plaintiff's contention that the debt is disputed has no basis at all. In the circumstances the defendant should not be restrained from proceeding with the winding-up petition.

[2] This is a genuine case for a winding-up petition and there is no evidence to indicate that the petition is an abuse of the process of the Court.

[Application dismissed.]

Cases referred to:
Jurupakat Sdn. Bhd. v. Kumpulan Good Earth [1973] Sdn. Bhd. [1988] 1 CLJ (Rep) 618
Chip Yew Brick Works Sdn. Bhd. v. Cheng Heer Enterprise Sdn. Bhd. [1988] 1 CLJ (Rep) 5
Mann & Anor. v. Goldstein & Anor. [1968] 2 All ER 269
Re Derrygarrif Investments Pty. Ltd. [1982] 1 ACLC 558
Re Gasbourne Pty. Ltd. [1984] 2 ACLC 103
Transfloors Pty. Ltd. v. S.W.F. Hoists & Industrial Equipment Pty. Ltd. [1985] 3 ACLC 66

Legislation referred to:
Companies Act 1965, ss. 217, 218, (2)(a)

For the defendant/applicant - Siew Yeow Wan; M/s. Raja Eleena Siew, Ang & Tan
For the plaintiff - Francis; M/s. Francis Lim & Co.

JUDGMENT

Zakaria Yatim J:

This is an application by the plaintiff for an order of the Court to restrain the defendant from instituting any legal proceeding to wind up the plaintiff company. The application was heard *inter partes*.

The plaintiff is a company incorporated in Malaysia having its registered office at No. 110A, Jalan Jejarak, Taman Maluri, Kuala Lumpur. The defendant is also a company incorporated in Malaysia and having its registered office at No. 1A, Jalan Jejaka 2, Taman Maluri, Kuala Lumpur.

In the plaintiff's affidavit in support of the application affirmed on 21 September 1988, the managing director of the plaintiff company averred that the receivers of the defendant company, through their solicitors, served a notice pursuant to s. 218 of the Companies Act 1965 demanding the plaintiff to pay a sum of RM344,510.42. According to the affidavit, if the plaintiff failed to pay the said sum as demanded within twenty-one days from the date of the notice, a winding-up proceeding would be taken against the plaintiff. The rest of the affidavit denied that the plaintiff owed the defendant the said sum of money. In the same affidavit the plaintiff did not disclose that the defendant had obtained judgment in default of appearance against the plaintiff.

It was the defendant company which disclosed that there was a judgment in default of appearance obtained against the plaintiff. In the affidavit of one of the receivers of the defendant company affirmed on 30 September 1980, the deponent stated that the notice under s. 218 of the Companies Act was sent pursuant to a judgment in default of appearance entered against the plaintiff on 23 May 1988 in the High Court Kuala Lumpur *vide* civil suit no. D2-23-394-88. A copy of the judgment was exhibited to the affidavit.

In a subsequent affidavit affirmed by the managing director of the plaintiff compnay on 24 January 1988, the plaintiff confirmed that the notice under s. 218 of the Companies Act was issued pursuant to the judgment in default of appearance. In the same affidavit the deponent averred that the plaintiff had applied to set aside the judgment in default and to stay all execution proceedings. The application to set aside the judgment in default was dismissed by the learned Judicial Commissioner. The plaintiff then applied for the matter to be adjourned to open Court for further argument but until today no date had been fixed for the hearing of the further argument. The plaintiff contended in the same affidavit that it had a good defence on the merits. The deponent averred that the debt demanded by the defendant pursuant to a notice under s. 218 of the Companies Act was being disputed on "substantial grounds." According to the plaintiff, the winding-up proceeding instituted by the defendant was based on a disputed debt and was therefore an abuse of the process of the Court.

At the hearing of the application, Mr. Francis Lim, Counsel for the plaintiff submitted that the debt demanded by the defendant was a disputed debt. He further submitted that the plaintiff had applied to set aside the judgment in default of appearance but the application was dismissed. According to him the plaintiff was waiting for a date to be fixed for the matter to be heard in open Court for further argument.

In an application to set aside a winding-up petition, where there is no judgment debt the question for the Court to consider is whether the petitioner is a creditor and the respondent is a debtor. If the debt claimed by the petitioner is disputed by the respondent then the petitioner is not a creditor as envisaged in s. 217 of the Companies Act. The petitioner is therefore not entitled to file a winding-up petition as he has no *locus standi* and the petition is an abuse of the process of the Court and should be struck off. See *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 1 CLJ (Rep) 618. The position is quite similar to that where there is an application to restrain the petitioner from proceeding with a winding-up petition by an interlocutory injunction. In *Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Interprise Sdn. Bhd.* [1988] 1 CLJ (Rep) 5, the learned Judge granted an injunction restraining the appellant from advertising a winding-up petition. On appeal to the Supreme Court, the appeal was allowed on the ground that the respondent company had admitted that it owed a substantial sum of money to the appellant and that it was at all material times ready and willing to pay the appellant the said sum. The Supreme Court held that as a substantial part of the debt was not disputed the respondent company was caught under s. 218(2)(a) as having neglected to pay its debt and was deemed to be unable to pay its debt. It seems to me that if the respondent had disputed the total sum claimed by the appellant, the Supreme Court would probably not interfere with the order of the learned Judge. In *Mann & Anor. v. Goldstein & Anor.* [1968] 2 All ER 269, the first defendant presented a winding-up petition against a company known as J. Ltd. based on alleged debt for director's fees. The debt was contested. The second defendant also presented a winding-up petition against another company known as C Ltd. based on alleged debt of 347 pounds for goods supply. The debt was disputed. In an action to restrain the presentation of the winding-up petitions, the Court decided that since the debts were disputed the petitioners were not creditors and had no *locus standi* to prevent the petitions. Accordingly, the presentation of the petitions was an abuse of the process of the Court and the Court granted an injunction restraining the advertisement or presentation of the winding-up petitions.

It will be noted that in *Chip Yew Brick Works* case and *Mann v. Goldstein, supra*, there were no judgment debts, whereas in the present case the defendant had obtained a judgment in default of appearance. The plaintiff had applied to set aside the judgment in default but the application was dismissed by the learned Judicial Commissioner. The plaintiff is now waiting for the matter to be heard in open Court for further argument. The question that arises here is whether the Court can restrain the defendant from proceeding with the winding-up petition against the plaintiff when there is a judgment in default of appearance.

Mr. Siew, Counsel for the defendant, cited two Australian cases where the petitioner, after obtaining a judgment in default of appearance against a company proceeded with a winding-up petition against the company.

In the first Australian case, *Re Derrygarrif Investments Pty. Ltd.* [1982] 1 ACLR 558 a company known as Maxaco International Pty. Ltd. (Maxaco) sought an order from the Supreme Court of Queensland that Derrygarrif Investment Ltd. (the company) be wound-up on the ground that the company was unable to pay its debts. It was not disputed that Maxaco had obtained and registered a Victorian judgment. When the case was heard before O'Bryan

J in the Victorian Court, the learned Judge ordered that the defence of the company be struck out and he entered interlocutory judgment against the company for damages. No one appeared on behalf of the company when O'Bryan J entered interlocutory judgment against the company. Subsequently the company applied to set aside the judgment but the application was dismissed. The company appealed to the Full Court of Victoria but the appeal was dismissed. In the Supreme Court of Queensland, Dunn J was urged to "go behind" the judgment since the judgment was obtained without a hearing on the merits. Dunn J decided that as a result of the judgment of the Supreme Court of Victoria there was a judgment debt. He exercised his discretion against the company and accepted the judgment as proof of the debt. The learned Judge found that the judgment obtained in Victoria was not obtained by collusion or fraud and he declined to go behind the judgment.

In another Australian case, *Re Gasbourne Pty. Ltd.* [1984] 2 ACLC 103, there was a multiplicity of proceedings associated with separate winding-up petitions lodged on behalf of eight petitioning creditors against eleven separate companies. In nine cases, the petitioning creditors obtained default judgment against the companies. In each case the company in question was a defunct shell with no officer capable or willing of looking after its interests. Service of the relevant writs took place upon non-existent registered office. The default judgment obtained in each case was nothing more than a charade. In that case Nicholson J did go behind the judgment. He found that as a matter of law the petitioners were not properly to be regarded as creditors of the company in any event. The learned Judge set aside the default judgments on the ground that the judgments were not supported by a valid debt and that the judgments were irregularly obtained.

I agree with the two Australian decisions referred to above.

Mr. Siew cited another Australian case, *Transfloors Pty. Ltd. v. S.W.F. Hoists & Industrial Equipment Pty. Ltd.* [1985] 3 ACLR 66 in support of his argument that a company which had obtained judgment cannot be restrained from proceeding with a winding-up petition. In that case Vasta J of the Supreme Court of Queensland, refused to grant an order for injunction to restrain from issuing a petition for the winding-up of the applicant. The learned Judge also refused to go behind the judgment. But it should be noted that in that case judgment was obtained after a lengthy hearing on the merits. I do not think I can rely on Vasta J's decision because in the present case we are concerned with a judgment entered in default of appearance.

Applying the principles laid down in *Re Derrygariff* and *Re Gasbourne*, to the present case, the first question to consider is whether the judgment obtained in default of appearance against the plaintiff is a regular judgment or whether the judgment was obtained by fraud or collusion. If there is allegation that the judgment was obtained irregularly or obtained by fraud or collusion, the Court has the discretion to go behind the judgment.

In the present case the plaintiff has not alleged that the judgment obtained in default of appearance is an irregular judgment. The defendant company in its affidavit affirmed on 31 January 1989 averred that the judgment was a regular judgment. The defendant further averred that the writ of summons and statement of claim were served on the plaintiff by way of prepaid AR Registered post on 7 May 1988 and the plaintiff's solicitors accepted service of same by acknowledging and returning the AR Card. The AR Card, which was exhibited to the affidavit, shows that service of the writ was accepted by Messrs. Francis Lim and Company, who are solicitors acting for the plaintiff.

In my opinion the judgment in default of appearance is a regular judgment. There is therefore a judgment debt and the defendant is a creditor as envisaged in s. 217 of the Companies Act. The plaintiff's contention that the debt is disputed has no basis at all. In the circumstances the defendant should not be restrained from proceeding with the winding-up petition. See *Chip Yew Brick Works* case *supra*. at p. 6.

I should add here that there is no evidence in the present case to show that the defendant had filed the winding-up petition merely to put pressure on the plaintiff to pay the debt. It appears to me that this is a genuine case of a winding-up petition and there is no evidence to indicate that the petition is an abuse of the process of the Court.

For the reasons stated above, I dismiss the application with costs.

Also found at [1990] 1 CLJ 462